

STATE OF CALIFORNIA
Budget Change Proposal - Cover Sheet
DF-46 (REV 08/15)

Fiscal Year 2016-17	Business Unit 0250	Department JUDICIAL BRANCH	Priority No.
Budget Request Name 0250-005-BCP-BR-2016-GB		Program 0135 - COURTS OF APPEAL	Subprogram

Budget Request Description
Appellate Court-Appointed Counsel

Budget Request Summary

The Judicial Council requests an ongoing augmentation of \$4.301 million General Fund to provide a \$10 per hour rate increase for the panel attorneys appointed by the Courts of Appeal.

Requires Legislation <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	Code Section(s) to be Added/Amended/Repealed	
Does this BCP contain information technology (IT) components? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No <i>If yes, departmental Chief Information Officer must sign.</i>	Department CIO	Date
For IT requests, specify the date a Special Project Report (SPR) or Feasibility Study Report (FSR) was approved by the Department of Technology, or previously by the Department of Finance. <input type="checkbox"/> FSR <input type="checkbox"/> SPR Project No. Date:		

If proposal affects another department, does other department concur with proposal? ☐ Yes ☐ No
Attach comments of affected department, signed and dated by the department director or designee.

Prepared By F. McGuire/D. Collier-Tucker	Date 01/07/2016	Reviewed By Madelynn McClain	Date 01/07/2016
Chief Administrative Officer <i>[Signature]</i>	Date 12/31/15	Administrative Director <i>[Signature]</i>	Date 12/31/15

Department of Finance Use Only

Additional Review: ☐ Capital Outlay ☐ ITCU ☐ FSCU ☐ OSAE ☐ CALSTARS ☐ Dept. of Technology

BCP Type: ☐ Policy ☐ Workload Budget per Government Code 13308.05

PPBA *[Signature]* Date submitted to the Legislature
1/7/16

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A. Budget Request Summary

This Budget Change Proposal (BCP) requests \$4.301 million General Fund to support a \$10 per hour increase for court appointed counsel panel attorneys.

B. Background/History (Provide relevant background/history and provide program resource history. Provide workload metrics, if applicable.)

In 1963, *Douglas v. California* (372 U.S. 353) held that the federal Constitution guarantees an indigent defendant convicted of a felony the right to a court-appointed attorney for the initial appeal. Twenty-two years later, in 1985, the Court clarified in *Evitts v. Lucey* (469 U.S. 387), that the guarantee of court-appointed counsel requires that counsel be competent. As indicated in *Evitts v. Lucey*, "[W]e have held that the Fourteenth Amendment guarantees a criminal appellant pursuing a first appeal as of right certain minimum safeguards necessary to make that appeal 'adequate and effective,' see *Griffin v. Illinois*, 351 U.S. 12, 20 (1956); among those safeguards is the right to counsel, see *Douglas v. California*, 372 U.S. 353 (1963)." "[T]he promise of *Douglas* that a criminal defendant has a right to counsel on appeal -- like the promise of *Gideon* that a criminal defendant has a right to counsel at trial -- would be a futile gesture unless it comprehended the right to the effective assistance of counsel." Rule of Court 8.300 (Courts of Appeal) and Rule of Court 8.605 (Supreme Court, death penalty cases) implement these constitutional requirements. Rule 8.300 states in applicable part: "Each Court of Appeal must adopt procedures for appointing appellate counsel for indigents not represented by the State Public Defender in all cases in which indigents are entitled to appointed counsel.... The court may contract with an administrator [project] having substantial experience in handling appellate court appointments to perform any of the duties prescribed by this rule." (Cal. Rules of Court, rule 8.300(a) and (e)(1).) For death penalty cases, Rule 8.605 states in applicable part: "'Appointed counsel' or 'appointed attorney' means an attorney appointed to represent a person in a death penalty appeal or death penalty-related habeas corpus proceedings in the Supreme Court..." And, "'Assisting counsel or entity' means an attorney or entity designated by the Supreme Court to provide appointed counsel with consultation and resource assistance. Entities that may be designated include the Office of the State Public Defender, the Habeas Corpus Resource Center, and the California Appellate Project of San Francisco." (Cal. Rules of Court, Rule 8.605(c)(1) and (c)(5).) The various Court-Appointed Counsel projects for the Courts of Appeal fulfill these rights for indigent defendants.

In order to be appointed by a Court of Appeal, a panel attorney must be qualified to represent indigent individuals during the appeal process and be affiliated with an appellate project. The panel attorneys are paid hourly for performance of certain defined tasks. Statewide, there are currently 890 attorneys serving on the six appellate panels, many of them are available to serve on multiple panels. The Court of Appeal in each district can appoint an attorney from the list of panel attorneys for the appellate project in its jurisdiction. Attachment 1 provides the criteria used by the Projects for placing attorneys on their panel. In 1997, the Appellate Indigent Defense Oversight Advisory Committee (AIDOAC), under the leadership of Justice Gary Strankman, produced a Report on the Efficiency and Effectiveness of the Court Appointed Counsel Program (accessible at <http://cdm16254.contentdm.oclc.org/cdm/ref/collection/p178601ccp2/id/561>). The report identified multiple challenges unique to appellate indigent defense, which were identified as disincentives to work on the panel. These challenges included:

- Appellate work requires a unique combination of sophisticated skills in the areas of writing, legal research, analysis, and advocacy.
- The area of criminal law is one of the fastest-changing areas of law, requiring the continual review of new legal opinions as well as an up-to-date knowledge of both initiatives and statutes.
- Appellate indigent defense presents a number of unique circumstances that tend to affect morale negatively:
- Relatively low remuneration compared to other areas of the law; and
- Low success rate (i.e., a high affirmance rate of lower court decisions); and isolation associate with solo practices.

Currently, there is a three-tier rate system of \$85/\$95/\$105 per hour for compensation for the attorneys who are appointed from the panel. Attorneys working on an assisted basis (with greater support from the appellate

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projects) are paid \$85 per hour. Attorneys working on an independent basis receive \$95 per hour. Attorneys working on an independent basis on the most complex cases (i.e., murders, sexually violent crimes, and convictions with a sentence of life without parole) receive \$105 per hour. The hourly compensation rate paid by the Courts of Appeal for this type of work is relatively low when compared to other areas of the legal profession.

From 1989 to 1995, the hourly rate for all appointed cases was \$65 per hour. In 1995, a second tier was added at \$75 per hour to differentiate compensation in assisted and independent cases. A third tier at \$85 per hour was added in 1998 for the most serious and complex matters. The next series of rate adjustment did not take place until October 1, 2005, when the rates increased by \$5 per hour; followed by a \$10 per hour increase in place July 1, 2006, and one final \$5 per hour increase effective July 1, 2007. That same 2007 rate that is still in place today has seen its purchasing ability eroded by more than 12 percent due to inflation. Had the rates kept pace with inflation, the \$85/\$95/\$105 rates set in 2007 would have risen to \$100/\$111/\$123 in 2015. The Judicial Council is requesting a \$10 per hour increase to raise these 2007 rates to \$95/\$105/\$115 per hour.

Fiscal Years Average- 11-12, 12-13, and 13-14	Average Number of Final Claims	Average Number of Hours Paid	Cost of Proposed \$10 Hourly Rate
Assisted Claims	1,394	61,835	\$ 618,350
Independent Claims	6,462	368,237	\$ 3,682,370
3-year Average	7,856	430,072	\$ 4,300,720
Total Avg. 3-Year Hours (11-12, 12-13 and 13-14)			\$4,300,720
\$10 Hourly Rate Increase			\$4,300,720

C. State Level Considerations

As noted above, the United States Constitution's Sixth Amendment guarantees the effective assistance of counsel in criminal proceedings as a fundamental part of our judicial system. The State's courts are required to provide counsel to indigent defendants and must do so in all appeals that come before them.

As set forth in the Judicial Council's long-range Strategic Plan for California's Judicial Branch 2006-2016, Justice in Focus (adopted December 2006; re-adopted and revised December 2014), the mission of the California judiciary is to "in a fair, accessible, effective and efficient manner, resolve disputes arising under the law... protect the rights and liberties guaranteed by the Constitutions of California and the United States."

Goal I of the Strategic Plan, Access, Fairness, and Diversity, states that "California's courts will treat everyone in a fair and just manner. All Californians will have equal access to the courts proceeding and programs.

Court procedures will be fair and understandable to court users. Members of the judicial branch community will strive to understand and be responsive to the needs of court users."

D. Justification

Recruitment of competent counsel who are willing and able to make a career of serving as appointed counsel indigent appeals, and retention of experienced counsel, are at the heart of an efficient and cost-effective appointed counsel program. A \$10 per hour rate increase is necessary to attract and recruit new attorneys, retain experienced attorneys, and allow the newer panel members to continue to serve on the panel while they gain the expertise to take on the more complex and more serious cases. Currently, 83 percent of the cases are assigned to more experienced panel attorneys on an independent basis, an increase of 19 percent since 1997. Independent assignments are the most cost effective. The CAC Program's ability to continue this level of independent assignments while providing competent representation is threatened by recent and projected future reductions in the pool of experienced attorneys who leave this field of practice. In recent years, a number of the program's most qualified attorneys have either left the panel or greatly reduced

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the number of cases they are willing to accept, in favor of accepting more lucrative representation in the federal courts.

Another serious threat to the stability of the upper ranks of the panel is the expected retirement of these tenured attorneys over the next 5-8 years. 31.6 percent of the current statewide panel attorneys were admitted to the California State Bar between 1971 and 1985. Panel attorneys are classified into 5 different levels, with Level 1 attorneys having the least amount of experience and Level 5 attorneys with the most. On the current panel, almost 20 percent of the level four and five attorneys were admitted to the Bar between 1971 and 1985. It is highly likely that these more experienced attorneys will begin retiring from the profession over the next 5 to 8 years and it is critical that the Program retain its current experienced attorneys and attract and retain new attorneys. The current hourly compensation rates have impacted the program's ability to attract new and retain the remaining experienced attorneys, and without an increase in compensation, the loss of experienced attorneys will ultimately have a severe negative impact on the Program.

The learning curve to move into the 4 and 5 levels is steep; typically, it takes between 4 and 7 years from when an attorney who joins the panel at the first level to reach level 4. The pool of experienced attorneys capable of providing high quality representation in criminal and juvenile cases on appeal has been decreasing in recent years. In 2012, there were approximately 936 panel attorneys statewide compared to 890 today which further emphasizes the need to both recruit new attorneys into the program and retain experienced attorneys as they increase their expertise and legal advocacy skills. Analyses prepared for the Appellate Indigent Defense Oversight Advisory Committee (AIDOAC) to assist in its oversight role over the CAC program, have indicated that the less experienced attorneys are less efficient and need more time and hours to handle cases than the more experienced attorneys, costing the program more.

The long-term health of the panel depends upon the ability of the Projects to recruit and retain capable, committed attorneys who are new to the field of appellate work to fill the soon to be depleted ranks of level 4 and level 5 attorneys. It is critical for these new attorneys to find financial viability in this specialized field in order to remain on the panel for the time necessary to assume a full caseload so that they can make a moderate living doing this work. Unless the system can attract and train, new attorneys and retain them in this field until they advance to the higher levels, the courts and the projects will find themselves with an inadequate number of attorneys to represent clients in the relatively more complex and serious cases. This will become a problem that would require more work on the part of the Courts, for which they are not staffed, to deal with a lower quality of work performed by court-appointed counsel. A \$10 per hour rate increase would dramatically improve the likelihood of continuing to move panel attorneys up the ladder of competence to handle the more complex and more serious cases.

It has been eight years since the last change in the compensation rate for the appointed counsel and the proposed \$10 increase would provide much needed stability in the system. As displayed in Attachment 2, this increase will not bring their compensation level in line with the criminal attorneys employed in the public or private sector, or the attorneys hired under contract with the State for legal services. Even with these increases, an experienced panel attorney who devotes 100 percent of his or her practice to handling indigent appeals still earns significantly less than experienced criminal attorneys in the private or public sector. To further illustrate the disparity in compensation, the Attorney General's Office bills at an hourly rate of \$170 for advice and legal services and \$120 per hour for paralegal services. The Department of General Services also bills at the same hourly (\$170) rate for providing legal services to state departments and entities, including but not limited to, providing legal advice to new and ongoing programs, issuing legal opinions on a variety of matters, providing consultation regarding public records requests, and adjudication of bid protests.

AIDOAC has taken other steps to ensure that in the future, panel attorneys continue to meet today's standards for qualification and competency. In May 2000, it co-sponsored, together with the appellate projects, a two-week intensive appellate college, designed to "fast-track" promising attorneys. In addition, AIDOAC has established two formal training programs where the Projects provide a high level of hands-on training and oversight for a small group of selected attorneys. One training program is for mentoring promising attorneys to help them grow from only being capable of handling assisted cases to begin handling independent appointments. The other formal training program is the Greening program, taking new attorneys to the panel and providing them a large number of cases with a significant level of oversight and assistance. These two

formal training programs have moved a limited number of attorneys to an independent status and provided them with the experience to handle some of the most complex cases. An AIDOAC subcommittee was also established to review quarterly reports from the Projects on progress and results of the attorneys accepted into the formal training programs. Even with these programs to move a greater number of newer attorneys more quickly into the independent appointment status, the Program continues to lose attorneys after spending valuable time and resources in training and mentoring them. The current compensation rate that has remained unchanged since 2007 is no longer sufficient and the program is unable to retain the experienced attorneys or attract and retain the newer attorneys.

E. Outcomes and Accountability *(Provide summary of expected outcomes associated with Budget Request and provide the projected workload metrics that reflect how this proposal improves the metrics outlines in the Background/History Section.)*

The \$10 per hour increase will provide a necessary rate adjustment to ensure qualified attorneys are appointed to the panels and have the ability to handle more complex and serious cases.

F. Analysis of All Feasible Alternatives

1. Provide \$4.301 million General Fund to support the \$10 hourly rate increase for panel attorneys.

PRO: Provide adequate compensation for panel attorneys.

CON: This is a \$4.301 million General Fund cost.

2. Provide \$2.150 million General Fund (50 percent) to support a partial hourly rate increase.

PRO: Provides a modest increase to panel attorneys.

CON: May be an insufficient increase to retain existing panel attorneys or recruit new attorneys. This is a \$2.150 million cost to the General Fund.

3. Status Quo: Provide no additional General Fund to support a \$10/hour increase for the panel attorneys.

PRO: No additional costs to the General Fund.

CON: The most experienced attorneys will leave the CAC Program and thus also increase the cost to the system. The quality of justice provided to the people of California may be seriously impaired.

G. Implementation Plan

Effective July 1, 2016, increase the hourly rate by \$10 for the Statewide Court Appointed Counsel panel attorney on cases appointed on or after July 1, 2016.

H. Supplemental Information *(Describe special resources and provide details to support costs including appropriate back up.)*

Attachment 1 - Criteria for Placement on a Court of Appeal Indigent Defense Panel (Non-Capital)

Attachment 2 - Comparison: 2015 Classification and Salary

I. Recommendation

The Judicial Council recommends Alternative #1, an ongoing General Fund augmentation of \$4,301,000 to support a \$10 per hour rate increase for the court appointed counsel panel attorneys.

Criteria for Placement on a Court of Appeal Indigent Defense Panel (Non-Capital)

The objectives of California's appellate court-appointed counsel (CAC) system are to: (1) further the right of indigent clients to receive the effective assistance of appointed appellate counsel, and (2) provide the appellate courts with useful briefing and argument. To meet those objectives (when the indigent client is not represented by the State Public Defender), California Rules of Court, rule 8.300 mandates that applicants be evaluated and screened before being placed on a panel of private-sector attorneys qualified for appointment.

Each district of the California Court of Appeal maintains an administrator, a public interest non-profit law firm ("appellate project"), to manage the CAC system and perform quality control functions. Each appellate project oversees a panel to which case appointments in its district are made.

Basic Qualifications

Before admitting an applicant to a panel, the administrator must determine that the attorney meets the following criteria:

(1) Experience and Skills

The attorney must have sufficient experience, knowledge and skill to perform the requisite tasks with a minimum amount of assistance from the administrator. For this reason, review of the applicant's recent writing samples may comprise an important part of the evaluation process. Quality is judged by the extent to which the written materials evidence strong research and writing skills, including demonstrating the ability to analyze facts; recognize, analyze, research, organize and argue issues; use persuasive analogies and distinctions in citing precedent; and communicate clearly and concisely.

The administrator may consider the attorney's legal education and academic performance, previous employment, past work in an environment that fostered quality and skill development, and references from those with personal knowledge of the applicant's abilities or familiarity with the applicant's reputation. Language skills and special areas of expertise may also be considered, along with information the administrator may acquire from other sources.

An administrator may place on the panel an attorney who has demonstrated the commitment to represent indigent clients effectively but still requires moderate assistance to perform the necessary tasks if the administrator concludes the attorney will soon acquire sufficient skills to work more independently.

(2) Commitment

The attorney must demonstrate a commitment to high quality representation of indigent appellants, including the willingness to keep current on developments in the law. Prior work in appeals, criminal and/or juvenile law, public interest and pro bono efforts, and representation of the indigent, may be considered.

(3) Conflicts of Interest

Inclusion on a panel is precluded if an attorney's other employment, association or activities give rise to an actual, potential or perceived conflict of interest.

(4) Cooperation with the Administrator

The attorney must be willing to cooperate with the administrator or other entity designated by the court; to be responsive to suggestions, both substantive and procedural; and to work toward improving the quality of the attorney's representation.

Comparison: 2015 Classification and Salary								
Class Description	Minimum Monthly Salary	Minimum Annual Salary	Maximum Starting Monthly Salary	Maximum Starting Annual Salary	Benefits-Minimum Salary	Benefits and Annual Salary-Minimum	Benefits-Max Salary	Benefits and Annual Salary-Max
California Appellate Project--SF								
Staff Attorney	\$ 4,197	\$ 50,364	\$ 9,324	\$ 111,888	\$ 17,627	\$ 67,991	\$ 39,161	\$ 151,049
Senior Staff Attorney	\$ 9,324	\$ 111,888	\$ 10,844	\$ 130,128	\$ 39,161	\$ 151,049	\$ 45,545	\$ 175,673
Supervising Staff Attorney	\$ 9,507	\$ 114,084	\$ 11,036	\$ 132,432	\$ 39,929	\$ 154,013	\$ 46,351	\$ 178,783
Litigation Support Analyst (Paralegal)	\$ 3,467	\$ 41,604	\$ 4,730	\$ 56,760	\$ 14,561	\$ 56,165	\$ 19,866	\$ 76,626
Habeas Corpus Resource Center								
Habeas Corpus Counsel I	\$ 7,021	\$ 84,252	\$ 8,923	\$ 107,076	\$ 29,488	\$ 113,740	\$ 37,477	\$ 144,553
Habeas Corpus Counsel II	\$ 8,084	\$ 97,008	\$ 10,787	\$ 129,444	\$ 33,953	\$ 130,961	\$ 45,305	\$ 174,749
Habeas Corpus Counsel III	\$ 9,148	\$ 109,776	\$ 12,209	\$ 146,508	\$ 38,422	\$ 148,198	\$ 51,278	\$ 197,786
Senior Habeas Corpus Counsel	\$ 10,089	\$ 121,068	\$ 13,461	\$ 161,532	\$ 42,374	\$ 163,442	\$ 56,536	\$ 218,068
Staff Attorney III	\$ 6,387	\$ 76,644	\$ 8,114	\$ 97,368	\$ 26,825	\$ 103,469	\$ 34,079	\$ 131,447
Paralegal I-HCRC	\$ 4,116	\$ 49,392	\$ 5,000	\$ 60,000	\$ 17,287	\$ 66,679	\$ 21,000	\$ 81,000
Paralegal II-HCRC	\$ 4,525	\$ 54,300	\$ 5,501	\$ 66,012	\$ 19,005	\$ 73,305	\$ 23,104	\$ 89,116
Supervising Paralegal-HCRC	\$ 5,725	\$ 68,700	\$ 6,959	\$ 83,508	\$ 24,045	\$ 92,745	\$ 29,228	\$ 112,736
Office of the State Public Defender								
Senior Deputy State Public Defender	\$ 8,872	\$ 106,464	\$ 11,392	\$ 136,704	\$ 37,262	\$ 143,726	\$ 47,846	\$ 184,550
Deputy State Public Defender (Class A: two years experience)	\$ 5,895	\$ 70,740	\$ 7,414	\$ 88,968	\$ 24,759	\$ 95,499	\$ 31,139	\$ 120,107
Deputy State Public Defender (Class B: four years experience)	\$ 6,636	\$ 79,632	\$ 8,512	\$ 102,144	\$ 27,871	\$ 107,503	\$ 35,750	\$ 137,894
Deputy State Public Defender (Class C: six years experience)	\$ 8,032	\$ 96,384	\$ 10,305	\$ 123,660	\$ 33,734	\$ 130,118	\$ 43,281	\$ 166,941
Supervising Deputy State Public Defender	\$ 8,879	\$ 106,548	\$ 11,290	\$ 135,480	\$ 37,292	\$ 143,840	\$ 47,418	\$ 182,898
Senior Legal Analyst (Paralegal)	\$ 4,829	\$ 57,948	\$ 6,048	\$ 72,576	\$ 20,282	\$ 78,230	\$ 25,402	\$ 97,978
Legal Analyst (Paralegal)	\$ 4,016	\$ 48,192	\$ 5,029	\$ 60,348	\$ 16,867	\$ 65,059	\$ 21,122	\$ 81,470
Public Sector (Benefits added at 31%)								
Attorney II (3-6 years criminal law experience)	\$ 11,105	\$ 133,258	\$ 12,050	\$ 144,604	\$ 41,310	\$ 174,568	\$ 44,827	\$ 189,431
Paralegal III	\$ 5,253	\$ 63,036	\$ 8,494	\$ 101,928	\$ 19,541	\$ 82,577	\$ 31,598	\$ 133,526

BCP Fiscal Detail Sheet

BCP Title: Appellate Court - Appointed Counsel

DP Name: 0250-005-BCP-DP-2016-GB

Budget Request Summary

Operating Expenses and Equipment
539X - Other

Total Operating Expenses and Equipment

Total Budget Request

Fund Summary

Fund Source - State Operations

0001 - General Fund

Total State Operations Expenditures

Total All Funds

Program Summary

Program Funding

0135 - Courts of Appeal

Total All Programs

	FY16					
	CY	BY	BY+1	BY+2	BY+3	BY+4
Operating Expenses and Equipment						
539X - Other	0	4,301	4,301	4,301	4,301	4,301
Total Operating Expenses and Equipment	\$0	\$4,301	\$4,301	\$4,301	\$4,301	\$4,301
Total Budget Request	\$0	\$4,301	\$4,301	\$4,301	\$4,301	\$4,301
Fund Summary						
Fund Source - State Operations						
0001 - General Fund	0	4,301	4,301	4,301	4,301	4,301
Total State Operations Expenditures	\$0	\$4,301	\$4,301	\$4,301	\$4,301	\$4,301
Total All Funds	\$0	\$4,301	\$4,301	\$4,301	\$4,301	\$4,301
Program Summary						
Program Funding						
0135 - Courts of Appeal	0	4,301	4,301	4,301	4,301	4,301
Total All Programs	\$0	\$4,301	\$4,301	\$4,301	\$4,301	\$4,301